

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2053

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
JOHN SUGGS,

Petitioner-Appellee,

- against -

J. EDWIN LaVALLEE,

Respondent-Appellant.
-----X

: On Appeal from the
: United States District
: Court for the Southern
: District of New York
: (72 Civ. 4336 K.T.D.)
:

BRIEF FOR PETITIONER-APPELLEE

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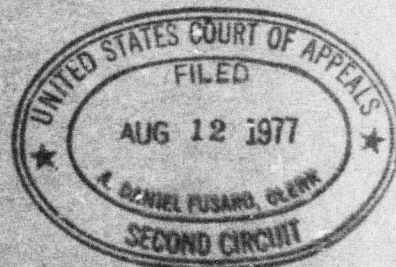


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BRIEF FOR PETITIONER-APPELLEE

Questions Presented

1. Whether the District Court correctly determined that the petitioner's pleas of guilty, entered on September 13, 1968, were void because he was incompetent to stand trial on that date.
2. Whether the District Court correctly held that the invalidity of petitioner's 1968 plea was not cured or waived by the 1969 sentencing proceedings and that the petitioner was therefore properly entitled to habeas relief.
3. Whether the District Court acted within its discretion in holding an evidentiary hearing on petitioner's competence at the time of the 1968 plea.

Preliminary Statement

This is an appeal from an opinion and order of the United States District Court for the Southern District of New York (Duffy, J.) dated April 5, 1977 [reported at 430 F. Supp. 877 (S.D.N.Y. 1977)] which ordered that petitioner's guilty pleas to state charges entered on September 13, 1968 under Indictment Nos. 3063/68, 3063A/68 and 2251/68 be vacated and that a writ of habeas corpus issue within 60 days, unless within that time the petitioner is allowed to replead in state court. The District Court found, after an evidentiary hearing, that the petitioner was incompetent at the time he entered his pleas of guilty.

On May 6, 1977, the respondent filed a Notice of Appeal from the decision of the District Court. That same day, Judge Duffy granted the respondent's motion for a stay of the order granting the writ pending the taking of an expedited appeal by the respondent.

This case has once previously been before this Court in proceedings which are discussed at pp. 23-26, infra.

Counterstatement of the Case

The Petitioner's Prior Institutionalization

The petitioner's long history of institutionalization begins with his referral to the Wiltwyck School for Boys by the Manhattan Children's Court in 1961 at age 10, incident to a "neglect petition". (Petitioner's Rockland State Hospital file, pp. 45-51 of Petitioner's Exhibit F at the hearing held before the District Court on January 17 and 21, 1977) The product of a broken home and unmarried parents, the petitioner had had a neglected childhood and had been subject to a number of traumatic injuries such as a fall down the stairs at age 3 and the amputation of the first joint of his little finger due to a crushing injury at age 4. (Pet. Ex. F, p. 46) Because of his unstable home environment, the petitioner was referred to Wiltwyck where his "behavior problems" increased.

A month after his admission to Wiltwyck, his mother died. This was a "devastating blow" to the petitioner who thereafter became obsessed with the idea that he himself or other children in his dormitory were responsible for her death. Petitioner manifested his obsessions through an attempt to blow up a schoolbus by shoveling dirt into the exhaust. On another occasion, the petitioner attempted suicide by drinking mercury from a thermometer. As his behavior became "more bizarre and also had a definite tinge of delusional thinking," (Pet. Ex. F, p. 47) the medical director of Wiltwyck referred him to Rockland State Hospital where he was admitted in August, 1963 at [about] age 12.

Dr. Katz examined the petitioner upon his admission to Rockland and observed that the petitioner's mental trend "exhibits a long history of both auditory and visual hallucinations . . . [with] obsessive compulsive thinking with some delusional aspects and paranoid ideation" and that his "[i]nsight and judgment are severely impaired." (Pet. Ex. F pp. 47-48) He noted that "[t]here is much of a schizophrenic about this youngster but he is extremely emotionally deprived" and that he "may be ultimately a schizophrenic." (Pet. Ex. F, pp. 48, 50) Dr. Katz's diagnosis was "Primary Behavior Disorders in Children. Conduct Disturbance" with a "guarded" prognosis. (Pet. Ex. F, pp. 48-50)

The examination confirmed the petitioner's "amputation of the first joint of his little finger because of a crushing injury." (Id. p. 49)

In January 1965, the petitioner was placed on "convalescent status" and took up residence with a guardian. He was officially discharged from Rockland in November 1965 when it was learned that he had been committed to Warwick Training School. His condition at discharge was termed "unimproved." (Pet. Ex. F, p. 51)

In July 1965, incident to the Warwick commitment, the petitioner was examined at the Bellevue Psychiatric Clinic pursuant to a Children's Court remand on another neglect petition. (Pet. Ex. C at the state and federal hearings,

pp. 23-43) The handwritten notes from that examination reveal that the petitioner's family life had become even more "disorganized" subsequent to his leaving Rockland and refer to his prior stay at Wiltwyck where he had been adjudged "schizophrenic" by a psychiatrist. (Pet. Ex. C, p. 29, 34) A doctor's notes dated 8/14/65 reveal the following:

"There is a strong possibility I feel that he [the petitioner] may develop into a Paranoid Schiz. [sic] in the future." (Ex. C, p. 37)

A psychologist, Susan Barron, diagnosed the petitioner as having a "character disorder [with] paranoid and borderline features" and as a "passive aggressive type" with the "potential for schizophrenia." (Ex. C, p.41)

Because of his "severe deprivation", emotional instability and unsatisfactory home environment, Bellevue recommended training school and supervision for the petitioner with a "guarded" prognosis. (Id. pp. 33, 35-36)

After his release from Warwick, the petitioner apparently took up residence with an aunt (Petitioner's Exhibit O at the federal hearing, p. 1) and was again institutionalized at Hampton State Training School in April 1967, from where he was apparently released one year later in April, 1968. (Pet. Ex. F, pp. 15, 52).

The Proceedings in State Court

The petitioner was arrested in the instant case at the age of 17 in May of 1968 and charged with the assault of a police officer under Indictment No. 2251/68. He was subsequently paroled, rearrested shortly thereafter, and

charged with a number of rapes and robberies allegedly committed in April and May of 1968 under two subsequent indictments. As early as June, 1968, the assistant district attorney initially assigned to the petitioner's case recommended "psychiatric observation."*

Because he was under 19, the petitioner was entitled to consideration for youthful offender treatment. (See McKinney's New York Code of Criminal Procedure, Section 913e et seq.) A psychologist and Dr. Emanuel Messinger, a psychiatrist, examined petitioner at the Supreme Court Psychiatric Clinic on July 17, 1968 in order to assist the court in deciding upon whether petitioner should receive such treatment. (St. Tr. 117-118, 166-167, 173-175).** Petitioner refused to cooperate on most of the Rorschach tests administered by the psychologist and neither the psychologist nor Dr. Messinger ever obtained the benefit of completed Rorschach tests.

In a report dated July 23, 1968, Dr. Messinger quoted extensively from the psychologist's notations incident to his examination of the petitioner and found petitioner to be "without psychosis and of average intelligence." The report

*See extract from the District Attorney file marked Court Exhibit Y in the hearing held by the District Court on January 17 and 21, 1977 and pp. 84-85 of the transcript dated January 21, 1977 (hereafter Fed. Tr. II).

**"St. Tr." refers to the transcript of the hearing held in state court on November 17 and December 1, 1975 and marked as Exhibit Z in the hearing held by the District Court in January 1977. References indicated by "__a" are to the Joint Appendix on Appeal.

classified petitioner's personality as "that of the Pathologic Personality Group, Emotionally Unstable Type, with depressive and paranoid trends," and adopted the psychologist's determination that a "poor prognosis is quite likely." It did not address the issue of the petitioner's competence to be tried and was characterized by Justice Emilio Nunez who presided at the petitioner's pleas of guilty and who still remembered the proceedings (infra at pp. 8-11) as "only a preliminary report because the Psychiatric Clinic [did] not have the time or the facilities to make the kind of complete examination that can be done at Bellevue Hospital." (Petitioner's Exhibit B at the state and federal hearings) Justice Nunez specifically noted that the report "did not speak to the issue of whether [the petitioner] was competent to be tried." (Id.)

Despite the petitioner's youth and his apparent emotional problems, he was disapproved for youthful offender treatment and, on August 1, 1968, he entered a plea of not guilty to the charges.

A day later, after an attempted suicide, the petitioner was transferred to the observation ward of the correctional facility where he had been incarcerated since his second arrest. The psychiatric social worker who interviewed him on August 2, 1968, indicated that the petitioner had attempted to hang himself in his cell as "retaliation"

against his parents who refused to write or visit.* The social worker also noted that the petitioner had a long history of institutionalization and was "quite disturbed." After a week of continual observation in the special ward, the petitioner was returned to the general population "on a trial basis." (Minutes of federal hearing held on January 17, 1977 (hereafter: Fed. Tr. I) at pp. 20-21). This incident was not known to Dr. Messinger, to the petitioner's counsel or to any judge before whom the petitioner appeared until the hearing before Judge Duffy on January 17, 1977.

On September 13, 1968, the petitioner appeared before Justice Nunez in the adult part of the Supreme Court with his counsel, Donald Tucker of the Legal Aid Society. (Plea Mins.: 6a) Neither Justice Nunez, nor Mr. Tucker was aware of the Messinger Report or of the petitioner's prior commitments to Rockland State Hospital and the Bellevue Hospital Center. (Pet. Ex. B; St. Tr. 141-142) After consultation with John Collins, the assistant district attorney handling the matter for the People, Mr. Tucker informed Justice Nunez that the petitioner wished to withdraw his prior plea of not guilty and offered to plead guilty to the crimes of rape in the first degree (under the first count of Indictment No. 3063/68) and robbery in the first degree (under the first

*The petitioner's correction files were marked as Petitioner's Exhibits J and K in the hearing before the District Court. The petitioner may have been under a delusion about his "parents" because his mother had died seven years earlier and he had never known his father. (Supra, p. 3)

count of Indictment No. 3063A/68) in full satisfaction of all counts of said indictments. The People recommended acceptance of the petitioner's plea and further recommended that the plea be accepted in satisfaction of Indictment No. 2251/68. (Id. 7a) The People moved also to dismiss Indictment No. 3523/68 which referred to the same offenses as Indictment No. 3063A/68 and this motion was granted. (Id. 11a)

Following the People's recommendation, a colloquy was held between the petitioner and Justice Nunez. During the course of this colloquy, the petitioner responded affirmatively when asked whether he had consulted with his counsel, whether he had heard the facts of his case as related to the court by the district attorney, and whether his guilty pleas to the two indictments were voluntary and not due to threats or promises. (Id. 14a, 19a, 20a) Justice Nunez thereupon accepted the pleas, but, thereafter, his further questioning produced the following bizarre answers which are not quoted in the respondent's brief and which led to petitioner's commitment to Bellevue Hospital Center:

"THE COURT: You are not sorry at all that you did any of these things, Mr. Suggs?

THE DEFENDANT: Nothing to be sorry about.

THE COURT: What?

THE DEFENDANT: There is nothing to be sorry about.

THE COURT: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

THE DEFENDANT: If I did something and I did it there is nothing to be sorry about after I do it.

THE COURT: No matter what you do?

THE DEFENDANT: No matter what I do. (21a-22a)

* * *

THE COURT: Well, don't you think it might help you if you show that you are sorry, you show some compassion for your victims?

THE DEFENDANT: I tried that once.

THE COURT: What?

THE DEFENDANT: I tried that once.

THE COURT: You tried that once? When was that?

THE DEFENDANT: When I was small.

THE COURT: What happened when you were small?

THE DEFENDANT: I lost a finger because I tried.

THE COURT: You lost a finger, you say?

THE DEFENDANT: Part of it.

THE COURT: What happened then?

THE DEFENDANT: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

THE COURT: Who tried to cut you, your mother or your sister?

THE DEFENDANT: My mother." (23a-24a)

Neither Justice Nunez nor petitioner's counsel was aware that petitioner's description of his loss of his finger was inaccurate or was aware of the accurate account of this injury in the petitioner's Rockland State Hospital file. Nevertheless the description of the event by petitioner was so strange on its face that Justice Nunez immediately stated that there was "something wrong" with petitioner and that he should have a "complete psychiatric examination and report on this boy" and on his own motion committed him to Bellevue Hospital for "examination and report". (Id. 24a-25a)

Notwithstanding the respondent's contrary assertion (Resp. Brief at pp. 7-8), it is obvious that Justice Nunez had doubts on the date of the pleas concerning the petitioner's competence. Justice Nunez's subsequent testimony (by stipulation)* shows that he thought the petitioner's answers were "unusual" and so "unexpected" that he independently recalled the plea seven years later. Further, Justice Nunez expressly testified that he ordered the Bellevue examination "not just for the purpose of sentencing but rather for all purposes, including a determination of whether the defendant was competent to be tried." (Pet. Ex. B) The reason the plea was not immediately set aside was obvious. If petitioner turned out

*Petitioner's Exhibit B at the state and federal hearings.

to be competent, the plea could stand and a new one would not be required.

Pursuant to Justice Nunez's order, the petitioner was initially examined by Dr. Martin Lubin on September 19, 1968 only six days after the entry of his plea. Dr. Lubin never knew of the Messinger Report or of the petitioner's medical history in the Rockland State Hospital records or his suicide attempt in August, 1968. (St. Tr. 70, 76) Nevertheless on that date, Dr. Lubin, who was then the chief psychiatrist at the Bellevue Prison Ward, (St. Tr. 44) concluded that petitioner was then incompetent. (St. Tr. 49-50) Dr. Lubin's preliminary notes from that interview reveal that the petitioner had long been a "behavior problem",* that his "assaults" led to his incarceration for a number of years in reformatory-type institutions and that the petitioner stated that he would have to be "shot" before being sent to a hospital. It was Dr. Lubin's view that "this boy sees circumstances around him in a totally distorted fashion." (Petitioner's Ex. C, pp. 3-4)

The notes further state that the petitioner "is certainly able to describe the details of the crime of felonious assault that he is charged with in an adequate manner.

*Dr. Lubin's notes were part of the petitioner's Bellevue Hospital Center file marked as Exhibit C in the state and federal hearings.

He could be competent with the help of vigorous defense counsel." Dr. Lubin later elaborated on this notation indicating that the petitioner was then incompetent but perhaps could be "assisted to a state of cooperation where he might then be considered competent" through the "vigorous assistance" of his attorney. (St. Tr. 49-50). Nowhere in Dr. Lubin's testimony is there support for the respondent's contention that Dr. Lubin felt at any time that the petitioner had a "personality disorder." (Resp. Brief p. 8, 16) To the contrary, Dr. Lubin's "impression" on September 19, 1968, that the petitioner was "Schizoid with Paranoid Features" (Pet. Ex. C p. 4) was explained by Dr. Lubin's own in-court testimony to mean that the petitioner was then incompetent. (St. Tr. 49-50, 63. 91).*

Dr. Lubin's notes of his first examination of petitioner also reveal that a question was raised in his mind as to whether the petitioner could be made to realize that he would have to face charges later and that Dr. Lubin spoke with the petitioner's counsel who indicated that "[t]he court felt that the boy's history was such that these violent acts [the alleged offenses] had to be secondary to determined behavior of a retaliatory kind probably pursuant to some delusion of persecution." (Id. at p.4)

*The respondent's dictionary reference to the definition of "schizoid personality" (Resp. Brief p. 8) does not take into account the "paranoid features" and the evidence of delusional thinking noted by Dr. Lubin in his September 1968 draft.

A second draft of Dr. Lubin's notes dated September 25, 1968, pursuant to a second examination of the petitioner (Petitioner's Ex. C, p. 7-9) confirmed the doctor's earlier diagnosis. Again, Dr. Lubin noted that the petitioner "sees circumstances about him [in] a totally distorted fashion, such that even the most innocuous stimuli lead to feelings of persecution." Noting that the petitioner was now denying involvement in the crimes charged, Dr. Lubin wrote that the petitioner's history is "indicative of a chronically deluded individual," and that his statements reveal the "degree of his delusions of oppression." Dr. Lubin concluded that the petitioner was suffering from "Schizophrenia, Paranoid Type."

In making his determination, Dr. Lubin considered and rejected the possibility that the petitioner might be attempting to feign incompetency or "bug out" as he called it, (St. Tr. 89-90) noting that competence is a matter of "degree" and that "bugging out" could have been to the petitioner's detriment.* (St. Tr. 93-94)

Dr. Lubin's final diagnosis appeared in his report dated October 21, 1968 incident to a third examination of petitioner. (Petitioner's Ex. C, pp. 18-19)** The report

*Boasts of "bugging out" were later made by the petitioner at Matteawan but resulted in no different diagnosis of the petitioner on the part of the Matteawan psychiatrists. (Infra at pp. 17-18)

**A legible retype of this report is annexed as Exhibit E to petitioner's Supplemental Petition for Writ of Habeas Corpus, dated April 16, 1974. (Document No. 33 in the Record on Appeal.)

discussed the petitioner's history of behavior problems and prior treatment in various reformatory institutions. It noted that petitioner's "ancillary history seems to indicate that he actually made specific and detailed admissions of the violence [of his alleged criminal acts] and in a manner to communicate [to the court] that those activities were based on bizarre motivations and were possibly a function of mental disorder." Dr. Lubin reaffirmed that the petitioner sees circumstances about him in a "totally distorted fashion." His final diagnosis was again "Schizophrenia, Paranoid Type" and he concluded that the petitioner was in "such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense." (Petitioner's Ex. C, p. 19)

These findings were concurred in by Dr. Lazlo Kadar, another psychiatrist who also examined the petitioner on October 21, 1968 and cosigned the report of that date. (St. Tr. 10-11)

Of additional significance in the petitioner's Bellevue file were the notes of a psychiatric case worker who interviewed the petitioner in connection with the Lubin-Kadar report. (Petitioner's Ex. C, pp. 15-17) These notes evince the petitioner's highly disturbed state on September 17, 1968, only four days after his pleading and revealed his "underlying hostility, confusion and disorganization" as well as his "poor

judgment and inability to control aggressive impulses."
(Petitioner's Ex. C, p. 17).

The district attorney, faced with the Lubin-Kadar report, had two choices: he could contest it at a hearing or he could agree with it. In this case he chose to waive any hearing on the report and thereby accepted it as an accurate report. (Mins. of hearing dated November 6, 1968: 136a)
Thereafter on November 6, 1968 pursuant to section 662-b*

*Section 662-b of the Code of Criminal Procedure provides in part:

1. If, after giving the district attorney and counsel for the defendant opportunity to be heard thereon, the court is of the opinion that the defendant is in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, the trial or proceedings must be suspended, except as hereinafter provided, until he is no longer in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him and the proceedings and of making his defense, and the court shall commit the defendant to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene or the state department of correction which has been approved by the heads of such departments. If the defendant is not in a hospital as defined in the mental hygiene law, the court shall direct the sheriff, if the court is located in a county outside the city of New York, and the court shall direct the department of correction of the city of New York, if the court is located in the city of New York, to hold the defendant temporarily pending such approval or designation of an appropriate institution in which the defendant shall be placed, and, when notified by the commissioner of mental hygiene of the designated institution, the sheriff or the department of correction, as the case may be, shall forthwith cause the defendant to be delivered to the head of such institution. If the defendant is in a hospital as defined in the mental hygiene law, the defendant shall be temporarily detained therein pending such approval or designation of an appropriate institution by the commissioner of mental hygiene.

2. A defendant so committed may at any time during the period of his commitment be transferred to any appropriate
(footnote cont'd next page)

of the Code of Criminal Procedure, Justice Samuel M. Gold of the Supreme Court signed an order in which he found the petitioner to be incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene.* This order was a judicial determination that the petitioner was incompetent** and had obviously been incompetent since at least September 13, 1968, the date on which Justice Nunez had committed him to Bellevue Center for the beginning of his psychiatric evaluation. On November 15, 1968, petitioner was committed to Matteawan State Hospital.

Petitioner's file from Matteawan (marked as Petitioner's Exhibit F at the hearing before the District Court)

(footnote cont'd from prior page)

state institution of the department of mental hygiene or of the department of correction, as may be approved by the heads of such departments. A defendant so committed shall remain in such institution until he is no longer in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or of making his defense thereto except as hereinafter provided. In that event the director of the institution where such defendant is confined shall inform the court and the district attorney, or their successors, of such fact that the person so confined may be returned forthwith to the authority by which he was originally held in confinement. The court from which such defendant was committed shall cause the sheriff without delay to bring the defendant from such institution and place him in proper custody, whereupon the proceedings against such defendant shall be resumed and he shall be brought to trial or legally discharged.

*A copy of this order was marked as Petitioner's Exhibit I at the hearing before the District Court. Judge Gold testified [by stipulation] that he had no recollection of this proceeding. (Pet. Ex. G at the federal hearing)

**See People v. Hudson, 19 N.Y.2d 137 (1967).

confirmed Dr. Lubin's findings, revealing that the diagnosis of petitioner accepted by the Matteawan Diagnostic Staff on December 19, 1968 was "psychosis with antisocial personality, paranoid and reactive features." (Exhibit F, p. 64) This diagnosis was made despite the petitioner's boast to the doctors that he had "bugged out and got myself sent to Bellevue" and that he had "put on an act" for Dr. Lubin. (Exhibit F, pp. 67-68)

On April 4, 1969, the Superintendent of Matteawan filed a report with the court certifying that petitioner was "no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or making his defense thereto." (Exhibit G to petitioner's Supplemental Petition for Writ of Habeas Corpus dated April 16, 1974. (Document No. 33 in the Record on Appeal.)) In a letter accompanying that report, the Superintendent gave a history of petitioner's psychiatric background and progress, reaffirmed the Matteawan Staff's diagnosis and noted that because of treatment with psychotropic drugs, petitioner's mental condition had gradually improved. The letter stated that at a recent staff presentation, the petitioner was attentive and cooperative and was able to give a coherent and relevant account of the events leading to his arrest. (Exhibit H to petitioner's Supplemental Petition for Writ of Habeas Corpus, supra.)

On the basis of that report, the petitioner was returned to court and certified as competent by Justice

Mitchell Schweitzer on April 9, 1969. (Exhibit A to petitioner's Supplemental Petition for Writ of Habeas Corpus, supra.)

After a second psychiatric examination by Dr. Messinger, and the submission of his report dated May 20, 1969 in which he again classified petitioner's personality as "being of the Pathologic Personality Group, Emotionally Unstable Type, with paranoid and depressive tendencies," (Respondent's Ex. 2 at the state and federal hearings) the petitioner appeared for sentencing before Justice Schweitzer on June 6, 1969 with newly appointed counsel; just four days previously, the United States Supreme Court had decided Boykin v. Alabama, 395 U.S. 238 (1969).*

Upon being asked by the court whether there was any legal cause why judgment should not be pronounced at that time, the petitioner replied that he was incapable of understanding the case at the time of his original plea. (Sentence Mins.: 27a) The court then stated to the petitioner that sentencing had previously been adjourned in order to give petitioner's counsel an opportunity to make any applications he deemed advisable with regard to withdrawing his plea. The court reminded the petitioner that his attorney had informed the court earlier that week that the petitioner did not wish to withdraw his plea. (Id. 28a) The court then inquired of the defendant personally, whether he wished to withdraw his

*The significance of this decision is discussed at pp. 48-53, infra.

plea or proceed with sentencing. Petitioner asked to be sentenced and indicated that he did not wish to withdraw his plea. (Id. 29a) At that point the court sentenced the petitioner to a term of 5 to 15 years.

No recognition was given by the sentencing judge to the possibility that the earlier pleas were null and void because petitioner was incompetent when they were entered and that therefore a completely new and valid plea was required before sentence could be imposed. The court made no inquiry into the voluntariness of the earlier pleas or whether any threats or promises had been involved, into the decision not to move to withdraw them or into the factual basis for the pleas. (Id. 32a) There was no inquiry as to whether the petitioner was aware that he was waiving certain constitutional rights and no advice with respect to the sentence that could be imposed. No hearing on competency was requested or held on this occasion.

Petitioner appealed to the Appellate Division, First Department arguing that a hearing into his competency at the time of sentencing should have been ordered sua sponte by the sentencing court. The Appellate Division affirmed his conviction without opinion. People v. Suggs, 35 A.D.2d 781 (1st Dept. 1970). On November 6, 1970, petitioner was denied leave to appeal to the New York Court of Appeals. (Supplemental Petition for Writ of Habeas Corpus at pp. 13-14.) (Document No. 33 in the Record on Appeal, supra.)

Petitioner also filed an application for a writ of error coram nobis in Supreme Court, New York County on August 7, 1970, again relying on the failure of the court to order a hearing at the time of sentencing on petitioner's competency at that time. This petition was denied in August, 1970, and no appeal was taken therefrom. (See Exhibit A to the petitioner's Supplemental Petition for Writ of Habeas Corpus.) (Document No. 33 in the Record on Appeal.)

In neither of these appeals did the petitioner make reference to the failure of the sentencing judge to make inquiries of the type required when guilty pleas are accepted or to the applicability of Boykin, supra, to his plea or sentence proceedings.

The Proceedings in Federal Court

On October 13, 1973, the petitioner filed a pro se application for a writ of habeas corpus in the United States District Court for the Southern District of New York. He again asserted that the state court, prior to its 1969 sentencing, should have ordered a competency hearing sua sponte into his competency at the time of sentencing. Again he did not refer to the Boykin decision or to the failure of the sentencing judge to make the inquiries required when guilty pleas are accepted.

On June 5, 1973, petitioner's present counsel was assigned by Judge Duffy. The respondent (then represented by

Stanley N. Kantor, Deputy Assistant Attorney General) conceded at page 12 of his Supplemental Memorandum in Opposition to Petitioner's Application for Habeas Corpus Relief dated June 14, 1973 (Document No. 30 in the Record on Appeal) that:

"[W]ere it not for the subsequent events [i.e. the sentencing] the guilty plea entered on September 18, [sic] would not furnish a basis for a conviction as it was not knowingly or intelligently entered into."

The respondent went on to argue that the pleas had been "reaffirmed" at sentencing, thereby validating an otherwise void conviction. Because this issue of "ratification" had never been raised before the state courts, the parties, on August 16, 1973, stipulated that the petition be placed on Judge Duffy's suspense calendar in order to obtain state court review on this point. (Document No. 32 in the Record on Appeal.)

On September 25, 1973, the petitioner moved to vacate the judgment of conviction in State Supreme Court upon the ground that he was incompetent when he entered his pleas of guilty on September 13, 1968 and that his 1969 sentencing did not constitute a valid substitute for an otherwise invalid plea since it had failed to comply with the Boykin standards as to the inquiries which must be made before any guilty pleas is accepted. (Ex. G to petitioner's papers filed in support of his Motion for Summary Judgment or Evidentiary Hearing, filed December 24, 1975 (Document No. 3 in the Record of Appeal)) On December 6, 1973, Judge Sandifer summarily denied the motion without a hearing upon the ground that he did not "read" Boykin

as requiring the sentencing court to "set [petitioner's] plea aside for the sole purpose of inquiring of him whether his pleas were 'intelligent and voluntary' . . . despite the fact that at the time his original pleas were taken . . . it is far from clear that the defendant was incompetent." (Opinion p. 3)* The court did not actually reach the issue of whether the petitioner was incompetent when he entered his pleas of guilty and its comment that Judge Nunez "apparently did not question the defendant's sanity at [the time of the plea]. . ." is belied by Judge Nunez's own testimony to the effect that he ordered the Bellevue examination for all purposes including a competency determination. (Supra at 11)

Leave to appeal to the Appellate Division was denied on March 5, 1974 and on May 17, 1974 the instant petition was removed from the suspense calendar and permission to file a supplemental petition raising the issues upon which exhaustion had thus been obtained was granted. This exhaustion process consumed over twenty months from the time petitioner first sought federal habeas corpus and 45 months from the beginning of his efforts to obtain collateral relief.

The District Court's Opinion of
February 25, 1975

On February 25, 1975, Judge Duffy, after determining that petitioner's state remedies had been duly exhausted both

*A copy of the opinion is annexed as Exhibit I to petitioner's Supplemental Petition for Writ of Habeas Corpus, dated April 16, 1974 (Document No. 33 on the Record on Appeal).

procedurally and as to the specific subject matter raised in the petition (35a - 36a) found that the petitioner's initial guilty plea was void since it was entered at a time when the petitioner was incompetent. In so holding, the Court found that there had been a judicial determination that the petitioner was incompetent as of September 13, 1968 and that therefore any guilty plea entered on that date was void under Pate v. Robinson, 383 U.S. 375 (1966) (41a - 43a). Judge Duffy premised his findings on the October 21, 1968 Lubin-Kadar report which, at that time, was the only psychiatric evidence in the record on the issue of the petitioner's competence. None of the parties was then aware of the existence of the two Messinger reports or of the petitioner's other medical records.

The Court further determined that the petitioner's 1969 sentencing was not a valid substitute for a guilty plea since the state court did not conduct a full and complete inquiry into voluntariness as required by Boykin v. Alabama, supra. Contrary to the Boykin requirement of an affirmative showing on the record of an explicit waiver of constitutional rights, the Court found that inspection of petitioner's sentencing minutes:

"reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's

ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it."(46a)

The Court further determined that no inquiry had been made with respect to a factual basis for the plea (id.) and specifically rejected the respondent's arguments that the petitioner's decision not to withdraw his plea at sentencing operated as a ratification of the prior invalid plea and a waiver of his objection to that plea's invalidity. (47a) The District Court did not hold an evidentiary hearing because such a hearing would have been futile given the "virtually non-existent record" before it and the "grossly inadequate post-Boykin" attempted plea ratification. (49a)

This Court's Decision of August 7, 1975

Respondent appealed Judge Duffy's order and, during the pendency of that appeal, the Messenger reports of July 23, 1968 and May 20, 1969 were "discovered". Rather than seek a remand to the District Court, respondent moved to expand the appellate record to include these previously unproduced reports.

"With the benefit of hindsight that the district court did not have," (54a) this Court vacated Judge Duffy's order and remanded the case:

"for an evidentiary hearing - by either the state court or the district court, as the latter may determine - on the prisoner's competence at the time his guilty pleas were

entered in light of two psychiatric reports which were not before the district court at the time the order now before us was entered." (54a; emphasis added)

This Court went on to note that the July 23 Messenger report "may well be of critical importance" on the issue of competency and held that it raised questions of fact as to the petitioner's competence at the time of his pleas. (59a) This Court also found it "most unfortunate" that the reports had not been located until April, 1975 "[i]n view of the fact that Suggs' petition has been pending in the district court since October 13, 1972 and the case already has had one trip to the state courts ..." (Id.) Finally, this Court made it clear that the determination as to whether to hold the hearing in state or federal court would be left to the discretion of the District Court, (59a) noting "the equally important policy of not exhausting state prisoners who seek to assert their federal constitutional rights." (60a)

The District Court's Order of
September 2, 1975

On remand, in an opinion dated September 2, 1975, Judge Duffy ordered that a factual hearing be held in state court but did not state in detail what the outside perimeters of such a hearing should be. A careful reading of Judge Duffy's opinion belies respondent's contention that the reference to the state court was for a full blown hearing on petitioner's competence. (Resp. Brief, p. 38-39) Rather the opinion merely

focused on certain types of evidence the state court should consider, or certain specific matters, as follows:

"At such a hearing it will be necessary for Mr. Justice Nunez to be called as a witness to ascertain whether he had knowledge of the facts and circumstances surrounding the psychiatric reports which were not revealed to me until the opinion of the Court of Appeals had been filed."

. . .

"The second group of witnesses that must be called include the Assistant Attorneys General who handled this matter, particularly with respect to the existence or non-existence of the records of such a hearing and commitment."

. . .

"Third, Mr. Justice Sandifer, who denied petitioner's motion to vacate judgment, must also be called as a witness to find out whether he had knowledge of these reports and what action, if any, he took in connection therewith." (62a - 63a; emphasis added)

The District Court's footnote discussing the "newly discovered evidence" of the Messenger reports can in no way be construed as an "urging" to the parties to present all available evidence to the state court. (Resp. Brief p. 14) Rather, it appears to have been a comment on the respondent's failure to request a remand to the District Court upon the discovery of such evidence thereby avoiding "a waste of judicial time" by this Court. (63a) The District Court concluded that the more convenient forum for taking such testimony would be the state court "[s]ince the necessary witnesses will include justices of the Supreme Court" (64a)

The Hearing Before Justice Melia

Pursuant to this order, a hearing was had before Justice Melia in the Supreme Court, New York County on November 17 and December 1, 1975, who assumed that he was to hold and therefore held a full blown hearing on petitioner's competency. The three most important witnesses were the three psychiatrists, Drs. Lubin, Kadar and Messinger who had examined petitioner before or after his pleas. Even a cursory reading of the hearing minutes reveals that the respondent has totally mischaracterized the psychiatric testimony given by Drs. Lubin and Kadar. (Resp. Brief at pp. 15-18)

Referring to the October 21, 1968 report which he had cosigned with Dr. Lubin, (supra at p. 15) Dr. Kadar testified that he had "agreed with everything" contained in it, else he would not have signed. (St. Tr. 10-11)* The generalized statements made by Dr. Kadar at the hearing with respect to the "fluctuations" in the mental condition of some patients were not necessarily true of the petitioner. (St. Tr. 19, 20-21) The witness had no recollection of having previously seen the Messinger report of July 23 and, despite rigorous cross-examination, was unable to give a professional opinion either way on the petitioner's competency at any time prior to the October 21 report. (St. Tr. 27-29, 31-33, 37-38)

*Dr. Kadar indicated that he applied the "usual criteria" in determining the petitioner's competency, viz: whether "the patient is able to understand the procedure, the crime, what he is accused of and to make his own defense." (St. Tr. 16)

Dr. Lubin* reaffirmed the conclusion he had reached after every examination of the petitioner in September and October of 1968 (supra, at pp. 12-15); viz, that the petitioner was incompetent to stand trial from September 19, 1968 onward. (St. Tr. 49, 50, 63)

Dr. Lubin had concluded that the petitioner was incompetent because:

There is a point at which you have to say 'this goes beyond the mark, and this has to be considered as incompetent.'" (St. Tr. 78)**

* * *

"[The petitioner] also had . . . a predisposition to a mental disorder which could in the pressures of the circumstance cause him to have a reactive psychosis, and that's the conclusion that I came to, that he had had a psychotic -- he was at a psychotic level of judgment." (St. Tr. 90)

Although the witness candidly conceded that the petition might have been competent at the plea, (St. Tr. 69-70, 73) it was equally clear from the testimony that he might well have been incompetent the day the pleas were entered. (St. Tr. 91)***

*Dr. Lubin was a specialist in forensic psychiatry having received his M.D. degree at the University of Miami and having "trained" at New York University and Bellevue Hospital. (St. Tr. 43, 44) At the time of the petitioner's examination, Dr. Lubin was the Chief of the Criminal Unit at Bellevue and had since become chief psychiatrist at Booth Memorial Hospital in Queens. (St. Tr. 43-45) He had conducted "thousands" of competency examinations. (St. Tr. 45)

**Dr. Lubin's elaboration on the potential effect of the petitioner's transfer to the Bellevue Prison Ward after the entry of his pleas (St. Tr. 79) related to a possible cause for the petitioner's "decompensation" and does not suggest that the petitioner was competent when he entered his pleas.

***It was stipulated by the parties that the word "incompetent" on page 91 of the state transcript, seven lines up from the bottom was erroneously transcribed as "competent". (Court Exhibit Z1 at the federal hearing.)

Respondent's contention that Dr. Lu n's testimony suggests that the petitioner was "probably" competent when he pleaded guilty (Resp. Brief p. 15) is simply unsupported by the record.

Dr. Messinger,* who had no independent recollection of the petitioner, acknowledged the authorship of the two reports dated July 23, 1968 and May 20, 1969. (St. Tr. 100) He indicated that on July 17, 1968 he had personally examined the petitioner for an hour to an hour and a half, made notes and had referred him for further examination to a psychologist who put the petitioner through a battery of psychological tests, some of which the petitioner did not cooperate on. (St. Tr. 101, 109; supra, pp. 6-7) He had also examined the petitioner on or about May 20, 1969. (St. Tr. 108) On both occasions he did not find the petitioner to be psychotic. (St. Tr. 103-104, 108)

Dr. Messinger made the following important observations:

- His conclusion would not necessarily hold true for the petitioner during the period between his two reports and those reports were not inconsistent with the other reports from the intervening period which found the petitioner then to be incompetent and with which he did not take issue. (St. Tr. 113-114)

*Dr. Messinger had graduated from Long Island College Hospital in 1929, interned at Montefiori Hospital, worked as a psychiatrist with the Veteran's Administration and was later appointed a senior psychiatrist at Bellevue. At the time of the hearing, he had been the psychiatrist in charge of the Supreme Court Psychiatric Clinic for 20 years and had since rejoined the Veterans' Administration. (St. Tr. 97-98)

- "People who are found competent on one day can become psychotic or incompetent . . . at a later date and they can recover." (St. Tr. 104)*
- To the extent that the petitioner had refused to cooperate on the Rorschach Test, he was denied the use of this diagnostic tool and, consequently, the petitioner may have concealed something from the psychologist which could have led to a different conclusion as to the petitioner's competency. (St. Tr. 112-113)
- The psychiatric clinic could not provide the same kind of continuous observation as would be possible at Bellevue because the clinic operated on an out-patient basis. (St. Tr. 122).
- The petitioner could have been experiencing psychotic episodes even at about the time of his examination so long as they were not manifested in some kind of aggression or particularly noticeable behavior. (St. Tr. 122)**

Justice Nunez, the only witness who had an independent recollection of the petitioner because of the unusual plea responses, (supra, p. 11) testified by stipulation that, had he known of the Messinger report, he might have still ordered a more complete examination of the petitioner at Bellevue Hospital. (Petitioner's Exhibit B at the federal and state hearings)***

*Indeed, the May 20, 1969 report notes that petitioner "subsequently . . . had a disturbed episode sufficient to have him committed to Matteawan where he remained some five and a half months . . . " (People's Exhibit 2), thereby acknowledging the petitioner's psychotic condition subsequent to the issuance of the July 23, 1968 report.

**Although Dr. Messinger qualified this statement by suggesting that the prison authorities would have brought any psychotic episodes to the clinic's attention (St. Tr. 122), it was clear from the petitioner's correction files that he was not referred to a psychiatrist despite his suicide attempt on August 2, 1968. (Infra, p.37)

***Justice Sandifer also testified by stipulation that he had no knowledge of the Messinger reports when he rendered his decision on December 6, 1973. (Petitioner's Exhibit A at the hearings)

Donald Tucker, Esq., who was petitioner's Legal Aid attorney at the plea and had no independent recollection of him (St. Tr. 128-129) stated that if he had known of a prior psychiatric examination of the petitioner he would have asked for a further examination at Bellevue. (St. Tr. 142) However, since he knew nothing of the Messinger report and did not himself observe any symptoms of incompetency on the part of the petitioner (St. Tr. 133), he permitted the petitioner to enter the pleas of guilty on September 13, 1968.*

The hearing at which the plea was taken was the only contact that John Collins, the Assistant District Attorney handling the plea for the People had with the petitioner. (St. Tr. 151) Consequently, his testimony that he did not observe anything unusual in the petitioner's behavior (again not an independent recollection but based on the lack of any notation to this effect in his file (St. Tr. 150-151)) is of little significance. The petitioner's medication record showed that he was administered Thorazine in 50 milligram doses while at Bellevue for his psychiatric examination. (Pet. Ex. C, p. 12) This drug (a brand of chlorpromazine) is indicated "for the management of the manifestations of psychotic disorders." Physicians Desk Reference, 31st ed. (1977) at 1504.

*Mr. Tucker, who had never had any psychiatric training, (St. Tr. 136) had no independent recollection of his having conferred with the petitioner prior to the plea or having obtained the impression that the petitioner understood the proceedings, the charges and the consequences of the plea, but was basing this testimony on his "customary practices" and the fact that there was no notation in his file concerning the petitioner's competency or lack thereof. (St. Tr. 130, 136-137, 195-196)

The State Court Decision

On December 3, 1975, Justice Melia rendered a decision which exceeded the narrow scope within which reference had been made by the District Court. Not only did Justice Melia make a legal determination that the petitioner was competent when he entered his pleas (93a) but he also concluded, in direct opposition to Judge Duffy's prior decision, that the petitioner had entered knowing and voluntary pleas and/or that the pleas were "ratified" at sentencing. (94a, 99a)

In his opinion, Justice Melia ignored the fact that Dr. Lubin found that the petitioner was incompetent six days after the pleas on September 19, 1968 and also disregarded the fact that Dr. Lubin's final diagnosis, which agreed with his earlier ones, was accepted by the court and the District Attorney and was the basis of a formal adjudication that the petitioner was incompetent. Moreover, the opinion made no reference to the petitioner's 1965 medical records from Bellevue or Justice Nunez's unimpeached testimony that after the plea, he ordered the petitioner examined for all purposes, not just as an aid in sentencing.

The District Court's Decision of November 16, 1976

On November 16, 1976, pursuant to this Court's prior opinion, the District Court ordered a hearing before it on the issue of the petitioner's competency at the time he entered his pleas of guilty. In his opinion, Judge Duffy

cleared up any doubt that may have existed as to the scope of hearing he had ordered in the state court and noted that "[s]ince necessary witnesses [at the hearing ordered by this Court] included Justices of the State Supreme Court, I requested from the State court findings concerning knowledge of the existence of the Messinger reports as bearing on the validity of Suggs' plea". (102a-103a) He determined that the state court had far exceeded the scope of his earlier order. (106a)

Judge Duffy also rejected respondent's contention that the petitioner was required to exhaust state remedies before returning to federal court, finding the argument "meaningless at this stage of the proceedings." (103a) He referred to the petitioner's prior coram nobis petition which had unsuccessfully raised the competency issue before Judge Sandifer* (104a) and further found:

"To seek to require a further [state] appeal with its consequent delay is an intolerable request which flies in the face of the 'important policy of not exhausting state prisoners who seek to assert their federal constitutional rights.' United States ex rel. Suggs v. LaVallee, 525 F.2d 539, 543 (2d Cir. 1975). Indeed, petitioner at this stage has done everything possible and appropriate." (104a)

The Court also pointed out that the reference to state court was "out of respect for the convenience of the Justices in

*In this Court's prior opinion, it was assumed that this issue had not been raised in state courts. In fact it had been previously raised but this fact was not then a part of the prior record on appeal. (104a, supra, p.22)

the State system, whose testimony was essential," noting that it was well within the District Court's discretion to hold the hearing itself. (104a-105a)

Judge Duffy made it clear that Justice Melia's determination had been gratuitously rendered since the District Court had only "remanded the case to State court for the mere taking of testimony to determine whether those involved with the case had knowledge of the Messinger reports." (106a) He also noted certain aspects of Justice Melia's decision which contradicted the record such as the state's determination that Justice Nunez ordered the post-plea examination for sentencing purposes only and that the petitioner's "bizarre" behavior at the plea related only to the fact that he was not sorry for what he had done. (107a) Because the discovery of the Messinger report of July 23, 1968 presented a question of fact on the issue of the petitioner's competence on September 13, 1968, which was incapable of summary resolution, (105a) the District Court denied the petitioner's motion for summary judgment (105a) and ordered an evidentiary hearing on the issues presented.

The Federal Competency Hearing

A hearing properly focused on the issue of the petitioner's competence as of September 13, 1968 was had before Judge Duffy on January 17 and 21, 1977.

The petitioner introduced the exhibits which had been received by Justice Melia and the transcript of the

state court proceeding (Pet. Exhs. A-E; Court Exhs. Z and Z1) as well as significant new evidence not presented to the state court, including:

- The petitioner's entire file from Matteawan (which contained records of the petitioner's prior hospitalization at Rockland State Hospital); (Pet. Ex. F)

- The testimony by stipulation of Justice Samuel M. Gold, the judge who committed the petitioner after consulting the Lubin-Kadar Report; (Pet. Ex. G)

- The minutes of the commitment hearing before Judge Gold and the order of commitment; (Pet. Exhs. H and I)

- The petitioner's 1968 files from the New York City Department of Correction; (Pet. Exhs. J and K)

- The petitioner's file from the Legal Aid Society incident to its representation of him on the instant charges; (Pet. Ex. L)

- The District Court order appointing a psychiatrist, Dr. Augustus Kinzel, to examine the petitioner in connection with the competency hearing and Dr. Kinzel's curriculum vitae; (Pet. Exhs. M and N) and

- The petitioner's complete 1968 file from the Bellevue Psychiatric Clinic. (Pet. Ex. O)*

The petitioner also offered the testimony of a representative of the New York City Department of Correction, Capt. Reginald Lee, additional testimony from Donald

*Apart from the Messinger Report of July 23, 1968 (Resp. Ex. 1) this file contains Dr. Messinger's handwritten notes, the psychologist's notations and recommendations and copies of the psychological tests administered to the petitioner incident to the July 17 examination.

Tucker, Esq. and the expert psychiatric testimony of Dr. Kinzel. The respondent offered no new evidence and merely introduced the exhibits which it had previously offered before the state court. (Resp. Exhs. 1-5)* The petitioner's evidence showed the following which was not in the state court record:

Capt. Lee testified that the petitioner's correction file revealed that he had been placed in a special observation ward for the reason of "inflicted self-injury" on August 2, 1968, only a week after the first Messinger Report had been prepared. (Fed. Tr. I, 17)** The petitioner was interviewed by a psychiatric social worker in connection with this "suicide attempt" on August 2 and August 8, 1968 (supra at pp. 7-8) (Fed. Tr. I, pp. 20-21) but was never referred to a psychiatrist. (Fed. Tr. I, 19-20, 22) The petitioner had subpoenaed his medical file from the Depart-

*Contrary to the inference in the respondent's brief (at p. 27) the respondent made no efforts to recall Dr. Messinger. His unavailability had been determined by counsel for the petitioner who stated it "for purposes of completing the record". (Fed. Tr. I, p. 40)

**In conjunction with the transfer, the petitioner wrote the following note to the officer in his cell block:

Dear Mr. Officer's

If you was me what will you do if you knew you was facing a lifetime Sentence, Plus you don't have no one visiting you or writing you what will you do. So I feel my best way out is a Easy way. I will not tell you what my easy way is but you soon find out. (Pet. Ex. K)

ment of Correction but it could not be located in their archives, (Fed. Tr. I, 20) nor was the psychiatric social worker who had interviewed the petitioner in August 1968 still employed by the Department of Correction. (Fed. Tr. I, 21)

Donald Tucker was recalled by the petitioner and, contrary to his prior testimony (St. Tr. 195), testified that there was something unusual about the petitioner's Legal Aid file. His attention was drawn to his handwritten statement, signed by the petitioner, stating that he (the petitioner) was guilty and fully admitted the charges pleaded to. (Fed. Tr. I, p. 34) Mr. Tucker stated that throughout the petitioner's Legal Aid file there were notations indicating that he had denied his guilt, denying it to every Legal Aid lawyer who had interviewed him,* until the date of the plea, at which point he became "adamant about taking the plea, wanted to take the plea, demanded to take a plea." (Fed. Tr. I, 35) The rather detailed statement regarding the petitioner's guilt was drawn by Mr. Tucker for his own protection. (Id.) He had nothing further to add to his prior testimony before the state court except that he found the petitioner's plea responses "weird". (Id. 31)

*The Legal Aid Society had "fractional representation" at the time of petitioner's plea, meaning that one lawyer did not necessarily represent the same defendant throughout the proceedings in criminal court. (Fed. Tr. I, 35)

Dr. Augustus Kinzel, a qualified psychiatrist appointed to examine the petitioner pursuant to the District Court's Order, (Pet. Ex. M) testified that he had graduated magna cum laude from Yale University, obtained his M.D. degree from the University of Pennsylvania in 1962, winning that school's prize in psychiatry, interned at Boston City Hospital and completed his residency in psychiatry at the Columbia-Presbyterian Hospital, obtaining the status of Chief Resident there. (Fed. Tr. II, 4, 8) In 1966, Dr. Kinzel became a staff psychiatrist with the United States Medical Center for Federal Prisoners in Springfield, Missouri where he became fully familiar with the Federal standards for determining the competency of defendants in criminal cases (Fed. Tr. II, 5) and where he conducted "hundreds" of competency examinations and testified in about 50 cases at the behest of both the defense and the prosecution. (Fed. Tr. II, 6-7) Under the Career Teaching Award Program,* Dr. Kinzel taught "Psychiatry and the Law" at The Columbia Law School and also lectured at the New York State Psychiatric Institute. Since the beginning of his teaching career, Dr. Kinzel had been promoted to an Associate in Clinical Psychiatry at Columbia University where he remains on staff. (Fed. Tr. II, 8) Dr. Kinzel's curriculum vitae (Pet. Ex. N) also reveals that he had authored a number of published research articles.

*The Career Teaching Award is basically a Federal grant which is given to a staff member of each Federal medical center who the Chairman of the Board feels merits encouragement in a teaching career. (Fed. Tr. II, 7)

Based upon a psychiatric examination of the petitioner, held on January 12, 1977, and a study of the petitioner's prior medical records (many of which were not available either to Dr. Messinger or to Dr. Lubin or Dr. Kadar) and the minutes of the plea of guilty, it was Dr. Kinzel's opinion that, on September 13, 1968, the petitioner was suffering from Paranoid Schizophrenia and was "probably" incompetent to stand trial. (Fed. Tr. II, 10-12, 30) Dr. Kinzel's was the only professional opinion in either hearing specifically directed to the petitioner's competency as of the date he entered his pleas. His testimony in general was as follows:

Petitioner's earlier files and his file from Bellevue Hospital covering his 1965 commitment there (Ex. C, pp. 23-43; supra pp. 3-5) suggested that the petitioner was suffering from more than simply a social disturbance or a conduct disturbance at the time and that he had symptoms which were suggestive but not conclusive of paranoid schizophrenia. (Fed. Tr. II, 24)

Dr. Kinzel reviewed petitioner's entire file from the Bellevue Psychiatric Clinic in connection with the Messinger examination of July, 1968, (Pet. Ex. O) and his diagnosis was inconsistent with that of Dr. Messinger rendered on July 23, 1968. Dr. Kinzel found that the symptoms and signs displayed to the July, 1968 examiners were signs of psychotic illness,

not simply those of a "personality disturbance". (Fed. Tr. II, 26-27)* Agreeing with Justice Nunez (Pet. Ex. B, supra), Dr. Kinzel found that the Messinger Report was not the result of a complete "psychiatric examination", in that it gave no medical history of the petitioner, no details of past illness, family illness or childhood history, but appeared to be a " cursory description of part of the [petitioner's] present mental state." (Fed. Tr. II, 28-29) Dr. Kinzel also noted that the diagnosis of "narcissistic behavior disorder of an extreme degree" suggested by the psychologist in the Messinger Report is "not a known entity in psychology or in psychiatry" and that the adjectives "willful, defensive, hostile, negativistic, paranoid and antisocial" used by the psychologist to describe the petitioner in fact described the symptoms of paranoid schizophrenia. (Fed. Tr. II, 30)

The information relating to the petitioner's suicide attempt while incarcerated in August 1968 which was not available to either Dr. Messenger or Dr. Lubin (supra, pp. 7-8) suggested that petitioner's handwritten note (supra, p. 37) was "a possible suicide note". (Fed. Tr. II, 33)

*Relying on the psychologist's statements, Dr. Kinzel noted that the petitioner did not respond to many of the questions on the psychological tests and that, consequently, these tests were not especially reliable. Dr. Kinzel cited the petitioner's apparent random non-cooperation as indicative of "odd behavior" noting that individuals who have a "character disturbance" ordinarily refuse to cooperate at all or give some "smart alecky" type response. (Fed. Tr. II, 28)

Several aspects of the petitioner's responses at the plea proceeding were of significance in connection with Dr. Kinzel's diagnosis. First, the petitioner seemed to have a "psychotic lack of judgment" having no serious awareness that he was being charged with major crimes or that the plea proceeding was a serious legal adversary situation.* As an example, Dr. Kinzel cited petitioner's failure to verbalize any motivation for his acts or make any attempt to defend his actions or show remorse short of his statements, "I just had it in mind" or "I simply had the thought to do these things and did them." (15a-18a) (Fed. Tr. II, 34-35, 45-46)

Second, Dr. Kinzel referred to the petitioner's bizarre and inaccurate response about having lost his finger the last time he tried being sorry, (23a) terming this response a "confabulation", or "loose association", a "classic sign" of psychosis or thinking disorder, wherein the psychotic will make statements as they come into his mind without exercising any judgment as to whether or not the statements are accurate, relevant or rational. (Fed. Tr. II, 37-38, 47)** Dr. Kinzel explained that the petitioner was able to de-

*This is similar to Dr. Lubin's testimony in the State hearing. (Supra, pp. 28-29)

**Dr. Kinzel determined from his interview with the petitioner that his hand had been caught in the chains of a swing when he was quite small and that his finger had to be amputated. (Fed. Tr. II, 37) This was corroborated by the petitioner's Rockland State Hospital file, supra, pp. 3-4 which had not been available to the other psychiatrists who examined petitioner.

scribe the details of the crimes involved because psychotics can very often account literally for their conduct without an understanding of why they did it, whether they should or should not have done it and whether they should give an explanation for it. (Fed. Tr. II, 39, 46)

Dr. Kinzel did not find it inconsistent with his diagnosis that the petitioner's Legal Aid lawyer did not recognize the petitioner's illness, nor was the petitioner's apparent adamance about pleading guilty in conflict with Dr. Kinzel's opinion (Fed. Tr. II, 41-42) it being very common for psychotic defendants he had known not to want to go into the details of the crime and to insist on pleading guilty in order to get the court case over with. (Fed. Tr. II, 74)

Contrary to the respondent's inferences (Resp. Brief, p. 31), it was clear from Dr. Kinzel's testimony that he agreed entirely with Dr. Lubin's diagnosis of the petitioner. Dr. Kinzel found that "Dr. Lubin accurately identified the delusions that the defendant had, particularly around the idea that he was going to be killed" and that "Dr. Lubin, I think, accurately diagnosed the psychotic condition as schizophrenia, paranoid type . . . " (Fed. Tr. II, 44-45) Dr. Kinzel also noted that the dosage of Thorazine administered to the petitioner at the time of the Lubin-Kadar report -- 200 milligrams a day -- is the dosage "usually given

to someone who is psychotic or mentally ill". (Fed. Tr. II, 43)

When queried on the possibility that the petitioner had sustained brief psychotic "episodes", Dr. Kinzel responded that incompetency is usually the result of a severe psychosis which generally lasts for weeks, months or even years and further indicated that it is very unusual for a patient to be competent one day and incompetent on the next. (Fed. Tr. II, 48-49)

Although Dr. Kinzel conceded the problems involved in a psychiatric determination eight years after the fact, he indicated that in the petitioner's case, given the mass of medical records available, the indications from the petitioner's own statements as well as those of others who observed him at the crucial time, and applying basic principles of psychiatry that few other psychiatrists would disagree with, there was a "very strong possibility or probability" that the petitioner was psychotic when he entered his pleas. (Fed. Tr. II, 51-53)

The District Court's Decision of April 5, 1977

In an opinion dated April 5, 1977 the District Court found, for the second time, that the petitioner was incompetent on September 13, 1968. Judge Duffy rendered findings of fact pursuant to Rule 52(a) of the Fed. R. of

Civ. Proc. which substantially conformed to the facts detailed above. (114a to 128a) Notably, the District Court referred to Dr. Lubin's tentative diagnosis of incompetence on September 19, 1968 and found that it was not inconsistent with Dr. Messinger's concession that the petitioner could have been experiencing psychotic episodes even during the period of July, 1968. (124a) The District Court, noting Dr. Kinzel's "impressive qualifications" (119a), further found that his diagnosis was not inconsistent with Dr. Kadar's view "that petitioner's condition as reported by Dr. Messinger deteriorated into a psychotic state" and that, like Drs. Lubin, Kadar and Messinger, Dr. Kinzel opined that the petitioner had experienced a psychotic episode from which he emerged at Matteawan. (125a) The Court accepted Dr. Kinzel's analysis of the petitioner's plea minutes, finding the petitioner's detailed report of the crimes entirely consistent with a psychotic state. (126a-127a)

The Court further held that:

"Weighing all the evidence, the conclusion is inescapable that petitioner was incompetent on September 13, 1968. Although Dr. Messinger indicated that petitioner was competent on July 23, 1968, that report was prepared some seven weeks before the pleas were entered, and as reflected in the May 20, 1969 report, Dr. Messinger acknowledged petitioner's psychotic condition which prompted the Matteawan commitment. He also conceded the possibility that petitioner may have been experiencing a psychotic episode even at the time the July examination was being conducted. The only other indicia of competence is Mr. Tucker's testimony and, although an attorney's opinion as to his client's abil-

ity to understand the nature of the proceedings and to cooperate in his defense is significant, United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir.), cert. denied, 408 U.S. 927 (1972), it is by no means controlling, especially in light of Justice Nunez's observation and reaction with which, based on my reading of the plea minutes, I agree. Dr. Kinzel's testimony relating to the account of petitioner's loss of a portion of his finger, and the indications that the finger was crushed and then amputated, rather than chopped off by Suggs' mother, as recalled by petitioner, bolsters my conclusion in this regard.

Furthermore, the above, coupled with the fact that petitioner was found to be incompetent by Dr. Lubin only six days after the plea, which conclusion was confirmed and corroborated by Dr. Kadar some four weeks later, and that on the basis of the Lubin-Kadar report, without objection by the respondent, petitioner was committed to Matteawan, substantially negates any other conclusion but that petitioner was indeed incompetent at the time of the pleas". (128a-129a)

The District Court ordered that petitioner's guilty pleas be vacated and that the writ of habeas corpus issue. (129a)

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT THE PETITIONER'S PLEAS OF GUILTY, ENTERED ON SEPTEMBER 13, 1968, WERE VOID BECAUSE HE WAS INCOMPETENT TO STAND TRIAL ON THAT DATE.

It is beyond question that a defendant who pleads guilty to a charge must do so voluntarily after proper advice and "with full understanding of the consequences".

Kercheval v. United States, 274 U.S. 220 (1927). A guilty plea operates as a conviction. Kercheval v. United States, supra. The conviction of an accused person while he is legally incompetent violates due process. Pate v. Robinson,

383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). As the Court stated in McCarthy v. United States, 394 U.S. 459, 466 (1969):

" . . . [I]t must be an 'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." (Emphasis added)

Similarly, the New York Court of Appeals in People v.

Boundy, 10 N.Y.2d 518, 225 N.Y.S.2d 207 (1962), stated:

"Of course, if he was mentally incompetent at the time of his plea the judgment was void . . . " Id. at 520.

Moreover, the colloquy surrounding a defendant's void guilty plea -- including any inquiry by the court into whether the plea was voluntary -- is also of no legal significance and is in fact a nullity since an incompetent defendant cannot be bound by any such proceedings. As the Supreme Court said in an analogous situation:

" . . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra, 383 U.S. 375 at 384.

Applying these principles, the District Court found that the petitioner was incompetent when he entered his pleas of guilty on September 13, 1968. The District Court's findings of fact pursuant to Rule 52(a) of the Fed. Rules of Civ. Proc. are amply supported by the record. Indeed, the respond-

ent does not even suggest that these findings are unsupported or clearly erroneous, nor does he take issue with the merits of the Court's determination of incompetency. Rather, he attempts to circumvent the District Court's unassailable findings by making two technical arguments which, as will be shown in Points II and III, infra, are without merit.

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT THE INVALIDITY OF THE PETITIONER'S 1968 PLEA WAS NOT CURED OR WAIVED BY THE 1969 SENTENCING PROCEEDING AND THAT THE PETITIONER WAS PROPERLY ENTITLED TO HABEAS RELIEF.

Apparently abandoning the "ratification" argument upon which the respondent so heavily relied in its prior appeal to this Court, the respondent now maintains that the petitioner "abandoned" his claim of incompetency when he was sentenced in June, 1969 (Resp. Brief, pp. 44-48), an argument which was explicitly considered and rejected by the District Court in its opinion of February 25, 1975. (47a to 48a) The record establishes, however, that the petitioner's 1969 sentencing operated neither as a "waiver" nor as a ratification of his earlier invalid plea.

A. THE SENTENCING WAS NOT AN ADEQUATE SUBSTITUTE FOR A VALID PLEA

Since the 1968 plea was void, the petitioner should have been given a new chance to plead when he was allegedly restored to competence in 1969. At the very least, his deci-

sion not to move to withdraw his prior plea should have been subject to all safeguards necessary for the original entry of the guilty plea. In this case, the 1969 proceedings are defective because the state court made absolutely no inquiry of the petitioner as to whether his prior plea (or present decision not to move to withdraw it) was voluntary, or whether the petitioner was aware of the sentence he faced or that he was waiving the important constitutional rights of a criminal defendant. Nor was there any inquiry as to whether there was a factual basis for the plea as required in United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974).

Four days prior to the date of the petitioner's sentencing, the Supreme Court decided in Boykin v. Alabama, 395 U.S. 238 (1969), that it is a violation of due process for a state court to accept any guilty plea unless the record plainly shows that an inquiry into voluntariness has been made and that appropriate answers have been obtained before the plea is entered. The Supreme Court specifically enumerated that among the rights waived by a defendant who pleads guilty are the right to a jury trial, the right to confront his accusers, and the privilege against self-incrimination. Id. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea

without an affirmative showing that it was intelligent and voluntary". Id. at 242*

It is clear that no such "affirmative showing" appeared on the record at the time of the petitioner's sentencing or at any other time during which the petitioner was competent.** Consequently, the District Court correctly held that the petitioner's sentencing did not operate to "reaffirm" or "ratify" his previously void plea.

*Kloner v. United States, 535 F.2d 730 (2d Cir.) cert. denied, U.S., 50 L. Ed.2d 312 (1976), cited by the respondent at p. 48 of his brief is inapposite for the simple reason that there, the defendant was informed of his right to a jury trial and the possible sentence he faced, but not of his right to remain silent or to confront witnesses. The District Court had inquired into the voluntariness of the plea the defendant proposed to enter and elicited a factual basis for it, albeit limited to a mere recital of the charges and an admission of guilt. Kloner v. United States, supra at 733-734. This Court further noted that "Our holding should not be construed as an endorsement of the procedure followed by the District Court in this case . . . " suggesting that a more literal application of Rule 11 of the Fed. R. of Crim. Proc. should be the rule. (Id.) Moreover, the Boykin mandate has been reaffirmed by Congress with the passage of a far stricter Rule 11 requirement which this Court has held obliges "each district judge [to] personally inform the defendant of each and every right and other matter set out [therein]. Otherwise, the plea must be treated as a nullity". United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976). (Emphasis added.) (The relevant portions of the new rule are reproduced in the addendum annexed hereto.) See also United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975). (Erroneous information as to possible sentence.)

**The respondent's argument that the petitioner's plea was "valid on its face" (Resp. Brief, p. 48) because it met pre-Boykin standards misses the mark since that colloquy was a nullity (Point I, supra) and the only proceeding which could have arguably "cured" the void plea was the sentencing, occurring four days after the Boykin decision.

B. THE PETITIONER'S SENTENCING WAS NOT THE EQUIVALENT OF A "WAIVER" OF THE INVALIDITY OF HIS PRIOR PLEAS

Largely for the same reasons outlined above, the respondent's argument that the petitioner "abandoned" his claim of incompetency is groundless. Just as the petitioner could not "waive" the constitutional rights enumerated in Boykin, supra, without an affirmative showing on the record that such a waiver was intelligent and voluntary, he could not, absent such a showing, waive his right to attack the invalidity of his void guilty pleas. Such a showing can only be meaningful when the defendant is competent to answer the court's questions.

The sentencing court never asked the petitioner whether his decision not to withdraw his prior plea was voluntary, whether he was aware of the implications of such a decision and whether he understood that such a decision was tantamount to a waiver of his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution. Even if the petitioner's decision not to move to withdraw his prior pleas can be construed as a waiver, it is patently defective in light of Boykin, supra, and must be treated as a nullity.

The respondent appears to rely on the language in Fay v. Noia, 372 U.S. 391, 439 (1963) which recognized the possibility that a state defendant might, for strategic or other tactical reasons, forego the privilege of seeking to vindicate his federal rights in the state courts before seek-

ing to assert them in a federal tribunal by deliberately "bypassing" state procedures. See Humphrey v. Cady, 405 U.S. 504, 517 (1972). Both the language and the facts in Fay v. Noia, supra, are totally inapplicable for the simple reason that in the instant case, there was no "bypass" of state proceedings, either deliberately or otherwise. Indeed, the petitioner expended a substantial amount of time and effort in order to insure that his state remedies had been properly exhausted, including the prosecution of an appeal from his conviction and the filing of two subsequent coram nobis petitions in state court, one of which raised the issue of his competence at the plea and the question of his "ratification" at sentencing.*

Finally, the respondent fails to note the following crucial language in Fay v. Noia, supra, 372 U.S. 391, 438:

"We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts. . . ." (Emphasis added)

The simple truth is that the respondent has failed to show or even allege that Judge Duffy abused his discretion in

*The District Court found "a proper exhaustion of state court remedies . . . both procedurally, . . . and as to the specific subject matter raised in the petition . . . " (36a) and categorically rejected the respondent's contention, raised again on appeal (Resp. Brief, p. 42n), that the petitioner should have taken a state appeal from Justice Melia's decision, finding it "meaningless". (103a)

granting federal habeas relief in this case.* Absent such a showing, the District Court's determination must stand.

POINT III

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN ORDERING AN EVIDENTIARY HEARING BEFORE IT ON THE ISSUE OF THE PETITIONER'S COMPETENCE AT THE TIME OF HIS PLEAS OF GUILTY.

It has been well settled since Townsend v. Sain, 372 U.S. 293 (1963) that federal habeas courts have broad power and discretion to order evidentiary hearings where the habeas petition alleges facts which, if true, would entitle the petitioner to relief. Procunier v. Atchley, 400 U.S. 446 (1971); United States ex rel. Clayton v. Mancusi, 326 F. Supp. 1366, 1373 (S.D.N.Y. 1971), aff'd, 454 F.2d 454 (2d Cir.), cert. den., 406 U.S. 977 (1972). Indeed, in this case, this Court expressly left to the discretion of the District Court the choice of forum in which to take evidence with respect to the petitioner's competence in light of the two newly discovered Messinger reports. (59a) Out of respect for the state judiciary, the

*Respondent's citation to Wainwright v. Sykes, U.S. , 45 L.W. 4807 (dec. June 23, 1977) is puzzling since that case has no relevance to the instant petition. There, the Supreme Court held that a state defendant's failure to comply with the state's contemporaneous objection rule in contesting the admissibility of a confession barred him from raising that issue at the state appellate level and, consequently, amounted to an independent and adequate state procedural ground which prevented review by the federal courts. Clearly, no such procedural impediment exists here.

District Court referred the matter to the state court for findings on the question of whether certain key individuals, including state court judges, had knowledge of the previously undisclosed Messinger reports. This remand was in keeping with Townsend v. Sain, supra, and this Court's concern for "the competing interests here involved" (60a).

As it happened, the state court exceeded the scope intended in the District Court's referral and made findings on issues which the District Court had planned to decide for itself. In such event it was quite appropriate for the federal court to set aside the ultra vires state court determination and hold a new hearing. (106a-109a, 114a) Even if the scope of the federal order had not been exceeded, the District Court's ordering of a new hearing was well within its discretion and entirely consistent with the principles laid down in Townsend v. Sain, supra, and this Court's prior opinion.

Highly significant additional evidence, not available to the state court, was elicited at the federal hearing. This evidence included testimony from the only expert psychiatric witness who was able to give an opinion on the petitioner's competence the day he entered his pleas of guilty. In addition, the state court was not aware of the petitioner's suicide attempt in August 1968 and had no knowledge of the petitioner's Matteawan file which contained his early medical history from Rockland State Hospital. In the light of this

additional evidence it would be a travesty now to ignore the federal hearing and revert to Judge Melia's findings.

In Blackwell v. Wolfr, 403 F. Supp. 759, 762 (D. Neb.), aff'd 526 F.2d 1142 (8th Cir. 1975), a district court was similarly constrained to hold an evidentiary hearing despite the state court's factual determination on the question of the petitioner's competence where the evidence before the state court was inadequate and where "a determination can now be made through the use of expert testimony about the petitioner's competency." (Emphasis added.) See also, United States ex rel. Early v. Morris, 396 F. Supp. 827, 834 (E.D. Ill. 1975). (Medical records and medical testimony on petitioner's addiction not before the state court justified federal hearing on issue of the petitioner's incompetence to stand trial due to intoxication.)

Finally, it need only be cursorily noted that many of Justice Melia's findings were directly contradicted by the record and the District Court so held.* (106a-108a) As stated in Townsend v. Sain, supra, at 316.

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights [citations omitted].***

Considering the record as a whole and the important evidence unavailable to the state court, it cannot be said

*See supra, pp. 34-35.

**See 28 U.S.C. § 2254(d)(8)

that Judge Duffy abused his discretion in holding the petitioner's competency hearing in federal court. His order granting the writ should be affirmed.

CONCLUSION

For the foregoing reasons, the order of the District Court should be affirmed.

Dated: New York, New York
August 11, 1977

Respectfully submitted,

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A D D E N D U M

Rule 11.

PLEAS

* * *

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

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